Supreme Court, U.S.
FILED
DEC 11 2002
OFFICE OF THE CLERK

(3)

No. 02-527

IN THE

Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* NORTH AMERICAN CONTRACTORS ASSOCIATION IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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STATEMENT OF INTEREST [1]

The North American Contractors Association ("NACA") is a voluntary organization of national construction and maintenance contractors who are engaged in major construction

[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amicus curiae* states that counsel for a party did not author this brief in whole or in part and that no one other than *amicus*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

projects, including public and private construction, heavy and highway construction, and maintenance work, totaling in excess of $25 billion per year.[2] NACA was formed to develop and negotiate innovative national and project-specific labor agreements on behalf of its member companies. NACA members both manage other contractors and engage in direct-hire construction under project labor agreements ("PLAs") across the country, on behalf of public as well as private owners.

NACA members have performed billions of dollars of work on federally funded construction projects, and have found that PLAs are a valuable and sometimes indispensable tool for managing large federal construction projects. The use of PLAs on federally funded construction projects dates back to the Grand Coulee Dam in 1938, and various atomic energy and defense construction projects during and after World War II. *See* U.S. General Accounting Office, *Project Labor Agreements: The Extent of Their Use and Related Information* 4 (1998). PLAs have been used on many major federally funded projects since then, such as Cape Canaveral, the Trans-Alaska Pipeline, the Boston Harbor cleanup, the Central Artery/Tunnel ("Big Dig") project in Boston, the Denver International Airport, the Oak Ridge Reservation in Tennessee, the Tennessee Valley Authority, the Nevada Test Site, and the National Ignition Facility at the Lawrence Livermore National Laboratory. *See id.* at 4, 9 & 25-26.

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[2] NACA members include the following: Bechtel Construction Company, Black & Veatch Construction, Inc., Dillingham Construction, Fluor Constructors International Inc., Fluor Nuclear Services, GAICO, Inc., J.A. Jones Construction Company, Jacobs Constructors, Inc., Kiewit Industry Co., Leonard Construction Company, NPS Energy Services, Inc., Oscar J. Boldt Construction, Parsons Construction Inc., Power Maintenance & Constructors, North American Energy Services, Washington Group, Stone & Webster Construction Co., Inc., Utility Resources, Inc., Sachs Electric Company, Babcock & Wilcox Construction Company, Inc., Murphy Industrial Constructors, and Graycor Industrial Constructors, Inc.

Executive Order No. 13,202 denies construction managers on federally funded projects, many of whom are NACA members, the ability to use PLAs on appropriate projects. While a PLA may not be necessary or useful on every federal project, there are many projects—particularly large-scale, complex, and time-sensitive projects—which could be completed more effectively and efficiently through the use of a mandatory, project-wide PLA. By removing this important project management tool from the arsenal of federal construction managers, the Executive Order will make it more difficult for NACA members to complete major federal projects on budget and on time. For these reasons, NACA is keenly interested in the questions presented in this petition, and urges the Court to grant the petition.

SUMMARY OF THE ARGUMENT

NACA, as an association of national construction contractors and managers, believes it is uniquely qualified to comment on two aspects of the questions presented in this case. First, as to the effect of Executive Order No. 13,202, NACA takes issue with the D.C. Circuit's conclusion that the Executive Order "does not prohibit a contractor or a subcontractor from entering into a PLA . . . it merely prevents the contracting authority from either requiring or forbidding the use of a PLA for a project." *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 30 (D.C. Cir. 2002). This is a naïve and unrealistic premise of the court's decision, and it reflects a fundamental misunderstanding of PLAs and construction industry labor relations.

Simply put, a PLA is effective only if all contractors and subcontractors working on the project are required to be bound by it. Discretionary application of a PLA, based on the individual desires and interests of each contractor on the project, would negate the essential utility of a PLA. A PLA is useful because it standardizes terms and conditions of

employment across an entire project, provides contractors a steady supply of skilled labor, guarantees against strikes or work stoppages during the life of the project, and establishes a uniform procedure for any and all labor disputes arising on the project. The Executive Order deprives federal agencies and construction managers of this valuable tool for managing large, complex, and time-sensitive projects which typically involve fifteen or more independent trade unions.

Second, NACA disagrees with the D.C. Circuit's conclusion that the Executive Order was a proprietary rather than regulatory act. This conclusion is based on the highly questionable assumption that the Executive Order's categorical ban on the use of PLAs, regardless of the size, scope, or location of the project, is consistent with the approach of a private sector construction manager or proprietor. *See Allbaugh*, 295 F.3d at 35 (finding no "good explanation" as to why the Executive Order "is somehow inconsistent with the action of a proprietor"). Based on the collective experience of its members, NACA can attest that such a categorical refusal to even consider the use of PLAs on certain projects is not an economically rational proprietary decision. Rather, the Executive Order's absolutist approach suggests philosophical and policy-driven motivations which have little to do with the government's proprietary interests on a given project.

The Executive Order should accordingly be treated as a regulatory action subject to normal preemption principles. Even though the Executive Order applies only to federally funded construction projects, and thus is nominally "proprietary" in nature, it is truly a proprietary act that is, in the words of this Court, "tantamount to regulation." *Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 289 (1986). The D.C. Circuit's decision fails even to consider this Court's decision in *Gould*, and it misinterprets this Court's decision in *Building & Constr. Trades Council v. Associated Builders & Contractors ("Boston Harbor")*, 507 U.S. 218 (1993). The

D.C. Circuit's decision is also inconsistent with the decisions of other circuit courts, and even with one of its own prior decisions, which have properly interpreted and applied *Boston Harbor* and *Gould*. Given this inconsistency between the D.C. Circuit's approach in this case and the law as articulated by this Court and several other circuit courts, the decision below merits review by this Court.

ARGUMENT

I. THE EXECUTIVE ORDER PROHIBITS THE EFFECTIVE USE OF PLAS ON FEDERALLY FUNDED CONSTRUCTION PROJECTS.

Executive Order No. 13,202 deprives federal agencies and construction managers of the ability to use PLAs in any effective way, by forbidding them from requiring contractors and subcontractors to adhere to the PLA as a condition of doing work on the project. The Executive Order provides, in relevant part, as follows:

> Section 1. To the extent permitted by law, any executive agency awarding any construction contract after the date of this order, or obligating funds pursuant to such a contract, shall ensure that neither the awarding Government authority nor any construction manager acting on behalf of the Government shall, in its bid specifications, project agreements, or other controlling documents:
>
> (a) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s); or
>
> (b) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

> (c) Nothing in this section shall prohibit contractors or subcontractors from voluntarily entering into agreements described in subsection (a).
>
> * * *
>
> Section 3. To the extent permitted by law, any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for projects, shall ensure that neither the bid specifications, project agreements, nor other controlling documents for construction contracts awarded after the date of this order by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on their behalf, shall contain any of the requirements or prohibitions set forth in section 1 (a) or (b) of this order.

Although the Executive Order permits contractors or subcontractors on federal projects to "voluntarily" enter into a PLA, the key prohibition is that a federal agency or a construction manager acting on the agency's behalf may not *require* adherence to a PLA (or any other labor agreement) as a condition of bidding on or performing work on the project.

This prohibition deprives federal construction managers of a right granted by the National Labor Relations Act ("NLRA"). As this Court held in *Boston Harbor*, Sections 8(e) and 8(f) of the NLRA authorize employers in the construction industry to enter into a PLA which can be required of all contractors and subcontractors working on the project. *Boston Harbor,* 507 U.S. at 230 (finding that Sections 8(e) and 8(f) "explicitly authorize this type of contract"). Section 8(f), 29 U.S.C. § 158(f), specifically permits employers in the construction industry to enter into prehire collective bargaining agreements, such as PLAs. The construction industry proviso to Section 8(e), 29 U.S.C. § 158(e), permits a construction industry employer to require all of its contractors and subcontractors to agree to

become bound by a labor agreement as a condition of performing work on a construction project.

The rights provided by Sections 8(e) and 8(f) of the NLRA enable contractors and construction managers to fix their labor costs before work begins on a project, and otherwise provide some measure of employment stability. The intent of these provisions is clear from the face of the statute as well as its legislative history, as this Court found in *Boston Harbor*:

> It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, the short-term nature of employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry.

Boston Harbor, 507 U.S. at 231.

By forbidding federal construction managers from exercising their lawful right to require all contractors and subcontractors to agree to a PLA before starting work on the project, the Executive Order robs the PLA of all meaningful utility. A PLA is effective only if it is required as a condition receiving an award of work on the project. The General Accounting Office, in its 1998 report on the use of PLAs on federal construction projects, recognized that among the characteristic provisions of a PLA is the requirement that all contractors and subcontractors must become signatory to the PLA:

> Their provisions generally (1) apply to all work performed under a specific contract or project, or at a specific location; (2) require recognition of the signatory unions as the sole bargaining representatives for covered workers, whether or not the workers are union members;

> (3) supersede all other collective bargaining agreements; (4) prohibit strikes and lockouts; (5) require hiring through union referral systems; (6) *require all subcontractors to become signatory to the agreement*; (7) establish uniform work rules covering overtime, working hours, dispute resolution, and other matters; and (8) prescribe craft wages, either in the body of the agreement or in an appendix or attachment.

U.S. General Accounting Office, *Project Labor Agreements: The Extent of Their Use and Related Information* 4 (1998) (emphasis added).

Indeed, the D.C. Circuit in its decision below likewise acknowledged that a PLA "typically requires that all contractors and subcontractors who will work on a project subscribe to the agreement." *Allbaugh*, 295 F.3d at 30. *See also Boston Harbor*, 507 U.S. at 222 (noting requirement in PLA that "all contractors and subcontractors agree to be bound by the Agreement").

It is thus undisputed that one of the fundamental terms of a PLA is the requirement that all contractors and subcontractors agree to be bound by the agreement as a condition of performing work on the project. The Executive Order clearly forbids this essential and perfectly lawful requirement on federal construction projects, thereby undermining the basic purpose of a PLA. Yet, the D.C. Circuit seemed to underestimate the impact of the Executive Order when it noted that the Order "does not prohibit a contractor or subcontractor from entering into a PLA . . . it merely prevents the contracting authority from either requiring or forbidding the use of a PLA for a project." *Allbaugh*, 295 F.3d at 30. The court apparently believed that, despite the Executive Order, PLAs would continue to be utilized on federal construction projects, albeit on a voluntary basis: "§ 1 [of the Executive Order] leaves contractors free to determine whether they will use PLAs on government contracts . . . ." *Id.* at 35.

The reality is that there is little or no incentive to negotiate or use a PLA on a federal project if the agency or its construction manager cannot require all contractors working on the project to be bound by the PLA before starting work on the project. PLAs are useful precisely because they establish uniform working conditions across an entire project, guarantee against strikes or work stoppages by any signatory union during the life of the project, and provide a comprehensive procedure for the resolution of any and all labor disputes arising on the project.

If contractors working on the project are permitted to opt out of the PLA, at their discretion, and instead apply their own labor agreements or unilaterally established terms and conditions of employment, the benefits of uniformity are obviously lost. Work on the project could be hindered or interrupted by conflicting work rules, jurisdictional disputes between the fifteen or more trade unions on the site, and strikes resulting from those disputes and from negotiations over each individual collective bargaining agreement being applied on the project. *See, e.g., Phoenix Eng'g. Inc. v. MK-Ferguson of Oak Ridge Co.*, 966 F.2d 1513, 1514-15 (6th Cir. 1992) (noting that PLA was negotiated for federal project at Oak Ridge nuclear facility after strike occurred following expiration of labor agreement applied on site).

Moreover, allowing contractors to wait and decide whether they will sign on to the PLA after they begin performing work on the project also defeats one of the main purposes of the PLA: by establishing a uniform set of wage rates, benefits, and working conditions, the PLA allows the project owner, as well as contractors, to more easily predict their labor costs before work on the project begins. If, however, contractors apply their own labor agreements with varying wage and fringe benefit rates and other working conditions—all of which may be subject to renegotiation during the term

of the project—then the task of projecting overall labor costs for the project becomes much more difficult, if not impossible.

Thus, the Executive Order's promise of discretionary PLAs is an illusory promise; in reality, the Executive Order amounts to an outright ban on the effective use of PLAs on federally funded projects. As such, it directly interferes with the right of federal contractors and construction managers to enter into such agreements, pursuant to Sections 8(e) and 8(f) of the NLRA. Federal agencies and recipients of federal funds are thereby deprived of a uniquely effective tool for managing multi-union labor relations, predicting labor costs, resolving disputes, and preventing strikes and other disruptions of work on major construction projects.

II. THE EXECUTIVE ORDER MUST BE VIEWED AS A REGULATORY ACT SUBJECT TO NLRA PREEMPTION.

While the Executive Order plainly conflicts with the lawful exercise of rights afforded by the NLRA, the D.C. Circuit avoided the preemption issue by deeming the Executive Order to be a proprietary rather than regulatory act. *See Allbaugh*, 295 F.3d at 35-36. The D.C. Circuit's application of the regulatory/proprietary distinction in this case is highly problematic, because it expands the scope of proprietary governmental conduct—*i.e.*, conduct exempt from preemption analysis—to encompass what must be viewed as an inherently policy-driven decision implemented through the power of the federal purse. This expansive interpretation of the scope of proprietary conduct is in conflict with this Court's decisions in *Gould* and *Boston Harbor*, and with the decisions of other circuit courts.

The definition of proprietary conduct articulated by the D.C. Circuit in this case gives the Executive Branch license to interfere with rights conferred by the NLRA (and presumably

other federal statutes), so long as the reason for interference bears some relation to work which is performed for the federal government or on projects at least partially financed with federal funds. *See Allbaugh*, 295 F.3d at 36 ("Because the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as 'regulatory.'"). This loose standard allows the Executive Branch to override or ignore federal statutory law in those substantial sectors of the U.S. economy which are devoted to federally funded work.

Such a broad interpretation of the scope of proprietary conduct is inconsistent with this Court's holdings in *Gould* and *Boston Harbor*. In *Gould*, this Court held that the NLRA preempted a Wisconsin procurement statute which debarred contractors that had been found to have violated the NLRA three times in a five-year period. The state argued that its action was exempt from NLRA preemption analysis because the statute was an exercise of the state's spending power rather than its police power. That argument was rejected, however: "by flatly prohibiting state purchases from repeat labor law violators Wisconsin 'simply is not functioning as a private purchaser of services' . . . for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Gould*, 475 U.S. at 289 (citation omitted).

In *Boston Harbor*, by contrast, this Court held that the Massachusetts Water Resources Authority's decision to use a PLA for the Boston Harbor cleanup project was proprietary conduct immune from NLRA preemption. The state agency's decision in *Boston Harbor* was, unlike the statute in *Gould*, "specifically tailored to one particular job." *Boston Harbor*, 507 U.S. at 232. Thus, there was "no question but that MWRA was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Ibid. See also Phoenix Eng'g*, 966 F.2d at

1524 (holding that PLA entered into on behalf of Department of Energy was proprietary rather than regulatory in nature).

Prior to its decision in *Allbaugh*, the D.C. Circuit interpreted *Boston Harbor* to give rise to a clear distinction between government procurement action "seeking to set general policy" and a governmental entity which is "just trying to operate as if it were an ordinary general contractor whose actions [a]re 'specifically tailored to one particular job'". *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1336-37 (D.C. Cir. 1996). Based on this distinction, the D.C. Circuit in *Reich* opined that Executive Order 12,818, which was promulgated by President George H. W. Bush and which contained virtually the same prohibitions as Executive Order 13,202, did not meet the *Boston Harbor* standard for proprietary conduct:

> [W]e very much doubt the legality of President Bush's Executive Order 12,818—since revoked, but upon which the government relies—that banned government contractors from entering into pre-hire agreements under § 8(f).

Id. at 1337. It is obviously difficult to reconcile this conclusion with the D.C. Circuit's subsequent holding in *Allbaugh*.

Other circuit courts have adopted a more narrow conception of proprietary conduct within the meaning of *Boston Harbor* and *Gould*. The Fifth Circuit, for instance, has articulated the following standard under *Boston Harbor*:

> [T]he key under *Boston Harbor* is to focus on two questions. First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general

> policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999). This approach has been cited with approval in other circuits. *See, e.g., Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002); *Petrey v. City of Toledo*, 246 F.3d 548, 556-57 (6th Cir. 2001).

The Fifth Circuit's analysis appropriately reconciles the distinctions drawn by this Court in *Boston Harbor* and *Gould*, whereas the D.C. Circuit's approach in *Allbaugh* utterly fails to account for the rule enunciated in *Gould*: government procurement action, although proprietary in form, may be "tantamount to regulation." *Gould*, 475 U.S. at 289. As this Court explained in *Gould*, "we cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration' . . . under the NLRA as long as they did so through exercises of the spending power." *Id.* at 290 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959)). NLRA preemption therefore must reach purely proprietary conduct that is essentially regulatory in purpose or effect.

Executive Order 13,202 plainly does not meet the standard of *Boston Harbor* and *Gould*. This conclusion is made apparent through application of the standard articulated by the Fifth Circuit in *Cardinal Towing*. First, the Executive Order does not address the federal government's "own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances." *Cardinal Towing*, 180 F.3d at 693. Given the federal government's longstanding and successful experience with PLAs on major federal con-

struction projects, it is very difficult to see how the Executive Order's categorical ban on the use of PLAs on federally funded projects was an action motivated by an objective interest in the "efficient procurement of needed goods and services." If the government were truly interested in the "efficient procurement of needed goods and services," it would, at a minimum, continue to permit the use of PLAs on those types of projects on which they have been used with great success in the past. In particular, the government would continue to permit the use of PLAs on large-scale and time-sensitive projects, and/or on projects located in labor markets with high union density and thus a high potential for strikes and other labor disruptions. That the Executive Order categorically precludes the use of PLAs even on these types of projects strongly suggests that the Executive Order is motivated by regulatory, rather than proprietary, interests.

For the same reason, the Executive Order also does not meet the second prong of the Fifth Circuit's analysis: the Executive Order is not so narrow in scope as to "defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing*, 180 F.3d at 693. The Executive Order, unlike the action of the Massachusetts Water Resources Authority in *Boston Harbor*, is not "specifically tailored to one particular job." *Boston Harbor*, 507 U.S. at 232. Nor is it even tailored to certain types of federal construction projects on which PLAs are traditionally not used or have not proven to be useful. The Executive Order instead prohibits the effective use of PLAs on all federally funded projects, without any meaningful exception.[3] Even if a federal con-

[3] Section 5 of the Executive Order permits an exception if the head of a federal agency finds that "special circumstances require an exemption in order to avert an imminent threat to public health or safety or to serve the national security." This is plainly a very narrow exception, and it does not allow for exceptions based on considerations of efficiency, economy, or

struction manager (such as one of NACA's members) could make a compelling economic argument for using a PLA on a particular project, the Executive Order nevertheless forbids its use or even its practical consideration.

Furthermore, there is no doubt that, in addition to construction projects undertaken directly by the federal government, the Executive Order has an impact on countless State, local, and independent government agency projects. To hold that an order which directly limits the labor relations options of such third party entities is "proprietary" in nature is to exalt form over substance in the extreme.

Given the Executive Order's far-reaching scope, it must be concluded that the Order is motivated, at least in part, by a "regulatory impulse." *Cardinal Towing*, 180 F.3d at 693. Accordingly, the Executive Order cannot properly be exempted from preemption analysis under the NLRA. To allow the D.C. Circuit's decision to stand would permit a dramatic expansion of the proprietary exception adopted by this Court in *Boston Harbor*, and it would sanction future efforts by the Executive Branch to invoke the power of the purse as a basis for intruding into areas regulated by the NLRA and other federal statutes.

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on-time completion—considerations that are fundamentally proprietary in nature. In fact, the prohibition on consideration of the potential for strikes or labor disruptions as a basis for an exception, an important subject for any construction owner or manager, is proof positive of the Executive Order's true regulatory character.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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